IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.18 OF 2006

Manish Estates Pvt.Ltd. ...Appellants

v/s

Official Assignee and others ...Respondents

Mr Aspi Chinoy i/b Mr Gobinda Mohanty for Appellants.

Mr Rohit Kapadia with Mr Riyaz Chagla i/b M/s Khaitan and Co. for Respondent Nos.2 to 5.

Mr K.D. Parikh for Respondent Nos.6 to 9 and 11.

CORAM : D.K. DESHMUKH J.

DATE : 14TH JULY 2006.

P.C. :-

1. This is an appeal filed under section 37 of the Arbitration and Conciliation Act 1996 (hereinafter referred as the said Act) challenging the order dated 29th September 2005 made by the learned Arbitrator under section 17 of the said Act. By that order, the learned Arbitrator has directed the present appellants - Manish Estates Pvt.Ltd., which is a Company incorporated under the Companies Act 1956 not to apply to Debt Recovery Tribunal for withdrawal of the surplus amount receivable by them to the extent of Rs.5/- crores. The facts that are material and relevant are that civil suit No.1421 of 1997 was filed in relation to the disputes arising out of the memorandum of understanding dated 9th March 1994. In that suit, it appears, the parties agreed to have their disputes referred to Arbitrator. The appellant - Company was not a party to that civil suit. By order dated 27th June 2005, in view of the agreement between the parties, this Court referred the disputes to the Arbitrator. Hon'ble Mr Justice V.D. Tulzapurkar (Retd.) was appointed as Arbitrator. It appears that thereafter petition under section 9 was filed before this Court which was Arbitration Petition (L) No.238 of 2005. By the date on which section 9 petition was moved before this Court, Mr Justice Tulzapurkar who was

appointed as Arbitrator was no more. This Court, by consent of the parties, by order dated 27th June 2005, appointed Mr Justice D.R. Dhanuka as Arbitrator in place of Justice Tulzapurkar. The petition filed under section 9 was permitted to be withdrawn with liberty to the petitioners in that petition to file application for interim relief before the learned Arbitrator. It is thereafter that an application under section 17 came to be filed before the learned Arbitrator. Admittedly, the present appellants were not party to that application. However, the learned Arbitrator issued notice to the appellants to appear before him, but the appellants did not appear before him. Ultimately, the learned Arbitrator passed the order which is impugned in this appeal restraining the present appellants from withdrawing money which it is otherwise entitled to withdraw from the Debt Recovery Tribunal. Perusal of the impugned order shows that even according to the learned Arbitrator, the appellant - Company is not party to the memorandum of understanding or to the arbitration proceedings, still the learned Arbitrator has made the order under section 17 of the said Act against the appellant - Company because the learned Arbitrator found that all the shareholders of the appellant - Company are parties to the arbitration agreement and therefore, according to the learned Arbitrator the appellant - Company is deemed to have been a party to the

arbitration agreement. The learned counsel appearing for appellants submits that the application was made before the learned Arbitrator by the respondent Nos.1 to 5 under section 17 of the said Act. Under section 17 of the said Act, an application can be made for interim relief by a party and the Arbitral Tribunal can pass interim order giving direction to a party. The learned counsel submits that the term ’party’ is defined by section 2(h) of the said Act to mean "a party to an arbitration agreement". According to the learned counsel therefore, as admittedly the appellant - Company was not a party to the arbitration agreement, a direction under section 17 could not have been issued to the appellants. The learned counsel submits that the said Act does not recognise the concept of ’any entity’ which is not actually a party to the arbitration agreement being deemed to be a party to the arbitration agreement and therefore, if an entity is not actually party to the arbitration agreement, an order under section 17 cannot be made and therefore, there was no question of the learned Arbitrator lifting the corporate veil for recording the finding that the appellant - Company is deemed to be a party to the arbitration agreement. According to the learned counsel appearing for original applicants, the order dated 22nd September 2005 appointing Shri Justice Dhanuka as Arbitrator was made on the application filed under section 9 of the

said Act to which the appellant - Company was a party and therefore, the appellant - Company is a party to arbitration agreement and therefore, order under section 17 can be made by the learned Arbitrator against the appellant Company.

2. Now, in view of the rival submissions, the question that has to be examined is as to how the disputes between the parties were referred to the Arbitrator. Admittedly, civil suit No.400 of 1992 was filed in this Court by the original applicants. The subject matter of the civil suit was disputes between the parties arising out of the memorandum of understanding. In that civil suit, minutes of order signed by the parties were filed by the parties. Paragraph 1 of those minutes of order is relevant, it reads as under :-

> "The disputes between the parties in the suit are hereby referred to the arbitration under the Arbitration and Conciliation Act 1996."

. Thus, the parties on 9th March 1994 entered into an arbitration agreement to refer the disputes between the parties to arbitration and they also agreed on the name of the Arbitrator. Pursuant to this agreement between the parties, the Court has passed

order dated 9th February 2000 disposing of the suit in view of the arbitration agreement between the parties. Thus, the arbitration clause is contained in the minutes dated 9th February 2000. Admittedly, to those minutes, the appellant - Company is not a party. Therefore, to the arbitration agreement between the parties, the appellant - Company was not a party. So far as the order dated 27th June 2005 is concerned, it is clear that by that order, what is done by consent of parties is that in place of Justice V.D. Tulzapurkar who was no more by then, Justice Dhanuka was appointed as Arbitrator. The order dated 27th June 2005 is not an order making reference of disputes to arbitration. It is an order naming a new Arbitrator in view of the death of the Arbitrator who was appointed earlier. This position is clear from the application filed by the original applicants before the learned Arbitrator wherein it is stated that the appellant - Company is not a party to the arbitration agreement but it is contended that it is deemed to be a party to the arbitration agreement because its shareholders are parties to the arbitration agreement. Perusal of the order of the learned Arbitrator shows that this contention that the appellant - Company is party to the arbitration agreement was not raised and on the contrary, before the learned Arbitrator, the parties proceeded on the understanding that the Company was not a party to

arbitration agreement.

3. Having found that the original applicants are not justified in contending that the appellants were a party to the arbitration agreement, the question that arises is whether in terms of the provisions of the said Act, the impugned order could have been made by the learned Arbitrator. Sub-section (1) of section 17 is relevant for this purpose and it reads as under :-

> "17(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute."

. Perusal of the above quoted provision shows that at the request of a party, an interim order can be made by the Arbitral Tribunal against the other party. It is thus clear that in so far as section 17 of the said Act is concerned, the entity seeking interim measure as also the entity against whom interim measure is sought should be a party. The term ’party’ as defined by section 2(h) to mean "a party to arbitration agreement". Thus, the entity which is party to the arbitration agreement can make an application for

interim measure under section 17 and the Arbitrator can make an order under that provision only against an entity which is a party to the arbitration agreement. What is required is that the entity should be actually a party to the arbitration proceedings. The Arbitration and Conciliation Act does not recognise the concept of somebody being deemed to be a party to the arbitration agreement. Therefore, in my opinion, the learned Arbitrator cannot be justified in embarking on the enquiry as to whether the Company can be deemed to be a party to the arbitration agreement. It has to be noted that even on behalf of the original applicants, there was no attempt made before me to justify the finding of the leaned Arbitrator that the Company can be deemed to a party to the arbitration agreement and therefore, an order under section 17 can be made against it. It is thus clear that the order made by the learned Arbitrator against the appellants is clearly beyond the powers of the learned Arbitrator under section 17 of the said Act and therefore, to that extent, it is liable to be set aside. In the result, appeal succeeds and is allowed, the order impugned in the appeal in so far as it operates against the appellants is set aside. no order as to costs.

4. At this stage, a request is made on behalf of the respondents that the operation of the order which is

set aside by this Court should be continued for some time. There was no interim order made in this appeal. After having found that the order impugned in the appeal was beyond the jurisdiction of the learned Arbitrator, in my opinion, this Court will not be justified in continuing that order. The request is rejected.

. Parties to act on the copy of this order duly authenticated by the Associate / Private Secretary as true copy.

. Certified copy expedited.